claimed but unfortunately for her the only reference to her in that agreement appears to be only at clause 16 which reads:

> 16. Save and except the agreement dated 27 May 1987 entered into between the parties hereto and the supplementary agreement dated 15 August 1987 entered into between the parties hereto and Chan Ka Mooi (F) (NRIC No. 4989835) all previous arrangements if any made between the parties hereto are hereby cancelled but without prejudice to any rights which have already accrued thereunder to either party.

The closing words categorically denote that although all previous arrangements if any made between the parties are cancelled, it does not prejudice any rights which had already been accrued to either party. For what it is worth, the referred agreement certainly does not absolve the third defendant from the claim now made by the plaintiff and despite it being annexed to one of the third defendant's affidavits, learned Counsel for the third defendant was himself not in a position to explain its inclusion or purpose while making his submissions. Consequently, I had to hold that the plaintiff's claim against the third defendant continued to stand and that the third defendant was liable in the circumstances.

All things considered, my view was that there were really no issues for trial. Accordingly, I had given the plaintiff the order in terms of their application.

PEMBINAAN MASDAMAI SDN. BHD.

v.

ME-WONG BUILDERS SDN. BHD.

HIGH COURT, MIRI
TUAN RICHARD MALANJUM J.
[ORIGINATING SUMMONS NO. MR 31 OF 1993]
8 FEBRUARY 1994

LAND LAW: Caveat - Plaintiff seeking removal of caveat - Plaintiff donee of power of attorney from registered proprietor in respect of parent title - Sub-division of parent title - Power of attorney endorsed on sub-divided issue document of title - Effect of endorsement - Whether endorsement was act of Registrar of Land Titles - Whether Registrar of Land Titles had power to so act - Whether a power of attorney would give an interest in land - Consideration of ss. 25, 45(3), 173(a), 177(1), 179, 189 of the Sarawak Land Code - Section 202 of the National Land Code - Land (Control of Subdivision) Ordinance.

PRACTICE & PROCEDURE: Application for removal of caveat - Claim for damages - Whether a power of attorney gave plaintiff the locus standi to commence this action.

The case before the Court was an application to remove a caveat registered at the Bintulu Land Registry Office affecting several parcels of land and for damages. The plaintiff secured an irrevocable power of attorney (the power of attorney) from the registered proprietor in respect of the parent title which was duly registered on 18 October 1983. Sub-division of the parent title was obtained and the sub-divided issue documents of title (IDT) contained *inter alia* an endorsement of the existence of the power of attorney.

The plaintiff submitted that the power of attorney should be considered as duly registered in relation to the IDT as it had been endorsed thereto. The defendant on the other hand contended that the plaintiff had no *locus standi* to commence this action as it was not within the category of persons specified under s. 177(1) of the Sarawak Land Code (Cap 81) (the Code). Furthermore, that the endorsement of the power of attorney was of no consequence because s. 189 of the Code had not been complied with and the power of attorney did not create any interest in the land as it was extinguished upon surrender of the parent title. Learned Counsel for the plaintiff conceded that a power of attorney

would not amount to an interest itself but that the word "interests" in s. 45(3) of the Code could be interpreted to include a power of attorney. He further argued that there was no provision for re-registration of the power of attorney under s. 189 of the Code and questioned the propriety of attacking the act of the Registrar of Land Titles when there was no error on the face of the document.

Held:

[1] From the copies of the IDT it was obvious that the purported endorsement appeared to be only copied or extracted from the parent title. As to whether it was the act of the Registrar of Land Titles or any of his clerks or whether he had the power to do so under the Code, the plaintiff was silent. Thus, the reliance on *Penang Development Corporation v. Teoh Eng Huat & Anor.* [1992] 1 MLJ 749 HC; [1993] 1 AMR 23 SC, was premature. The Court found no reason why it could not be questioned by way of defence if it was obvious that the law provided no such power. On that ground alone the Court ruled that the plaintiff had not satisfied the requirement of s. 177(1) of the Code.

[2] Assuming that the endorsement was the act of the Registrar of Land Titles, question remained whether he had the power to act as such. There was no provision in the Code for the continuation of a title deed on land in the event of sub-division, surrender and subsequent issuance of sub-divided title deeds similar to s. 202 of the National Land Code. Similarly in the Land (Control of Sub-division) Ordinance referred to in s. 25 of the Code, if applicable. Thus, the IDT in the instant case were not and should not be taken as continuation of the parent title. The Court was fortified in this view firstly, by the wordings of s. 45(3) of the Code which provided for the issuance of "a new document of title" after a surrender and secondly, after perusing copies of the IDT where nothing was shown that it was a continuation of the parent title save by implication from the endorsements of registered charge, the power of attorney and a caveat. Therefore the endorsement of the power of attorney on the IDT had to be considered with suspicion.

[3] To say that the word "interests" in s. 45(3) of the Code was wide enough to cover a power of attorney was not consonant with the usual status accorded to a power of attorney. The purported endorsement of the power of attorney on the IDT was of no consequence as it was not provided by the Code or any written law currently in force in Sarawak. Accordingly, the plaintiff had not met the requirement of s. 177(1) of the Code. Furthermore, upon perusal of the power of attorney, the Court found no provision for the plaintiff to so act. The Court therefore ruled that the plaintiff had no *locus standi* to commence this action.

[Application dismissed with costs].

Cases referred to:

Penang Development Corporation v. Teoh Eng Huat & Anor. [1992] 1 MLJ 749 HC; [1993] 1 AMR 23 SC ***(cit)***

Mohammed Bin Buyong v. Pemungut Hasil Tanah Gombak & Ors. [1982] 2 MLJ 53 ***(refd)***

Wandsworth London Borough Council v. Winder [1984] 3 All ER 976 ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. [1979] 1 MLJ 135 ***(cit)***

Lee Chi Min & Anor. v. Superintendent of Lands & Survey Department, Kuching [1981] 1 MLJ 93 ***(refd)***

Commissioner of Land Titles, Penang v. Lim Theng Hoe [1988] 1 MLJ 24 ***(cit)***

Legislation referred to:

Sarawak Land Code (Cap. 81), ss. 25, 45(3), 173(a), 177(1), 179, 189

Land (Control of Sub-division) Ordinance (Cap. 81)

National Land Code 1965, s. 202

Other sources referred to:

The Torrens System in Australia, Douglas J. Whalan, p. 143

For the plaintiff - Albert Tang; M/s. Chew, Jugah, Wan Ullok, Goh & Co.

For the defendant - Linton Albert; M/s. Linton & Co.

JUDGMENT

Richard Malanjum J:

By an originating summons dated 28 April 1993 supported by an affidavit of one Jimmy Lai Tuck Wah affirmed on 16 April 1993, the plaintiff is applying for:

(i) the removal of caveat registered at the Bintulu Land Registry Office as Instrument No. L. 2654/1992 affecting several parcels of land;

(ii) an order for compensation for damages suffered; and

(iii) costs

At the outset of the hearing learned Counsel for the parties submitted the agreed issues for the

determination by this Court. They are as per the document marked "A" namely:

(a) Whether the power of attorney dated 17 October 1983; Instrument No. L 5024/198, gives the plaintiff the right to apply to the High Court for an order that the caveat lodged by the defendant on 30 October 1992, Instrument No. L 2654/1992, be removed, *vis-a-vis* s. 177(1) of the Land Code (Cap. 81);

(b) Whether the defendant has caveatable interests in the lands caveated *vide* caveat dated 30 October 1992, Instrument No. L 2654/1992, *vis-a-vis* s. 173(a) of the Land Code (Cap.81);

(c) Whether the defendant ought to pay damages to the plaintiff *vis-a-vis* s. 179 of the Land Code (Cap. 81) and if so, the issue of assessment of damages, interests and costs.

Learned Counsel for the parties further agreed that issue (a) above should be considered first before the other issues are argued.

There are several affidavits filed by both parties in this action but for the purpose of issue (a) only the affidavit of Lai Chee Hua affirmed on 6 October 1993 (hereafter called "Lai Chee Hua's affidavit") has been specifically referred to. Arising from Lai Chee Hua's affidavit and the submissions of learned Counsel there are several undisputed facts being disclosed which in my view are relevant in determining issue (a). They are as follows:

(i) Lease of Crown Land No. 6237 (hereinafter called "the said land") is the parent title of the sub-divided issue documents of title affected by the caveat in question;

(ii) the registered proprietor of the parent title and subsequently the sub-divided issue documents of title after the surrender and sub-division is Matnor bin Arshad @ Matnor bin Alsat;

(iii) the plaintiff secured an irrevocable power of attorney dated 17 October 1983 (hereafter called "the said power of attorney") from the registered proprietor in respect of the parent title and which was duly registered on 18 October 1983 *vide* Instrument No. L. 5024/1983;

(iv) sub-division of the parent title was applied and completed upon the registration of the sub-divided issue documents of title with their respective lot numbers given on 6 November 1991; and

(v) the sub-divided issue documents of title contained, *inter alia*, an endorsement of the existence of the said power of attorney referred to in (iii) above. The endorsement is in the form of being copied only or rather an extract from the parent title.

It is the plaintiff's case that it has commenced this action on the ground that it is the donee of the said power of attorney. And the plaintiff argued that the said power of attorney should be considered as duly registered in relation to the sub-divided issue documents of title as it has been endorsed thereto.

The defendant on the other hand is contending that the plaintiff has no *locus standi* to commence this action as it is not within the category of persons specified under s. 177(1) of the Sarawak Land Code (Cap. 81) (hereinafter referred to as "the Code"). Learned Counsel for the defendant also contended that the purported endorsement of the said power of attorney on the sub-divided issue documents of title was of no consequence because:

(i) Section 189 of the Code has not been complied with;

(ii) the parent title had been surrendered and only registered charges and other interests in the parent title run with the said land. Otherwise the effect of the surrender is a reversion of the said land to the government. Section 45 and in particular s. 45 (3) of the Code was referred to. Learned Counsel submitted that the said power of attorney did not create any interest in the said land and therefore upon the surrender of the parent title the effect of the registration of the said power of attorney was extinguished and did not continue in the sub-divided issue documents of title; and

(iii) a power of attorney is in effect only an authority given.

In reply learned Counsel for the plaintiff conceded that a power of attorney would not amount to an interest itself under s. 45 (3) of the Code. But he submitted that the word 'interests' in s. 45(3) could be interpreted to include a power of attorney. He further argued that there was no provision for re-registration of a power of attorney under s. 189 of the Code. Learned Counsel also questioned the propriety of attacking the

act of the Registrar of Land Titles without going by direct attack when there was no error on the face of the document. He cited the case of *Penang Development Corporation v. Teoh Eng Huat & Anor.* [1992] 1 MLJ 749 HC and subsequently the same case before the Supreme Court in [1993] 1 AMR 23.

Having considered the submissions of learned Counsel I think the question to be asked is: "What is the effect of the purported endorsement of the said power of attorney on the sub-divided issue documents of title?".

From the copies of the sub-divided issue documents of title annexed to Lai Chee Hua's affidavit it is obvious that the purported endorsement appears to be only copied or an extract from the parent title. As to whether or not it was the result of the act of the Registrar of Land Titles or by any of his clerks or that he had the power to do so under the Code, the plaintiff appeared to be silent. (See *Mohammed bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53). Thus, the reliance on the *Penang Development Corporation's* case in my view was premature. Further, I found no reason why it could not be questioned by way of defence if it was obvious that the law provided no such power. (See *Wandsworth London Borough Council v. Winder* [1984] 3 All ER 976 HL). On this ground alone I think it can be ruled that the plaintiff has not satisfied the requirement of s. 177(1) of the Code.

Even assuming that the endorsement was the act of the Registrar of Land Titles, the question remained whether he had the power to act as such. The following provisions of the Code are relevant in considering the issue.

Section 25 reads:

> Subject to the provisions of the Land (Control of Sub-division) Ordinance, and such rules as may be prescribed, any proprietor may, with the approval of the Superintendent, sub-divide his holding and transfer or sub-lease any sub-division thereof:
>
> > Provided that no sub-division shall be approved by the Superintendent without the sanction of the Permanent Secretary, Ministry of Lands and Mineral Resources.

Section 45(3) reads:

> A surrender in accordance with the provisions of subsection (1) may, with the approval of the Superintendent, be made by the proprietor during the currency of any term for which the land has been alienated and a new document of title may be issued to him for the balance of such term, or for such other term as may be in accordance with rules made hereunder, subject to such conditions as may be imposed by the Superintendent and subject to such registered charges and other interests as may affect the estate or interest surrendered on the date of the surrender.

Section 177(1) reads:

> Any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged, may at anytime, if he thinks fit, apply to the High Court for an order that the caveat be removed.

Section 189 reads:

> Every power of attorney intended to be used for the purpose of effecting a dealing under this Code shall be presented to the Registrar and shall be registered and retained by him, unless a duplicate or attested copy thereof is furnished to the Registrar in lieu.

It is to be noted that there is no provision in the Code providing for the continuation of a title deed on land in the event of its sub-division, surrender and subsequently issuance of sub-divided title deeds similar to that of the **National Land Code, s. 202.** (See also *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135).

There is a reference to Land (Control of Sub-division) Ordinance by s. 25 of the Code and even assuming that the said Ordinance is applicable, there is also no provision in that Ordinance for the continuation of a title deed on land in the event of sub-division resulting in issuance of new sub-divided title deeds. (See *Lee Chi Min & Anor v. Superintendent of Lands & Survey Department, Kuching* [1981] 1 MLJ 93). Thus, the sub-divided issue documents of title in the instant case are not and should not be taken as continuation of the parent title. (See also *Commissioner of Land Titles, Penang v. Lim Theng Hoe* [1988] 1 MLJ 24). I am fortified of this view firstly, by the wordings of s. 45(3) which provides for the issuance of "a new document of title" after a surrender and secondly, after perusing the copies of the sub-divided issue documents of title annexed to Lai Chee Hua's affidavit. Nothing is shown in any of those copies indicating that it is a continuation of the parent

title. In fact no reference at all is made to the parent title save by implication from the endorsements of registered charge, the said power of attorney and a caveat. On the basis that:

(i) the relevant sub-divided issue documents of title are taken as new documents of title and not a continuation of the parent title;

(ii) the limited savings by s. 45(3); and

(iii) the effect of the surrender of the parent title not in dispute,

the endorsement of the said power of attorney on the sub-divided issue documents of title must therefore be considered with suspicion.

Learned Counsel for the plaintiff had rightly conceded that a power of attorney would not give an interest in land. Learned author Douglas J. Whalan in his book **"The Torrens System In Australia"** at page 143 wrote:

> ...that a power of attorney is not truly a registered instrument conferring an estate or interest.

But to say further that the word 'interests in s. 45(3) is wide enough to cover a power of attorney is not consonant with the usual status accorded to a power of attorney.

It follows therefore that the purported endorsement of the said power of attorney on the sub-divided issue documents of title is of no consequence as it is not provided for by the Code or under any written law currently in force in Sarawak. Accordingly, the plaintiff, in my view, has not met the requirement of s. 177(1) of the Code. And on this ground as well I agree with the contention of the defendant that the plaintiff has no *locus standi* to commence this proceeding.

I have also taken the liberty to peruse the said power of attorney annexed to the supporting affidavit of the originating summons and regrettably I find no provision for the plaintiff to act as he did over the sub-divided issue documents of title. Clause 1 of the said power of attorney stipulates:

> To appoint and instruct solicitors, architects and engineers for the purpose of negotiating or settling with the authorities concerned all matters relating to all my right title share and interest in that parcel of land together with the buildings thereon and appurtenance thereof, if any, situate at Sungai Sebab, Bintulu, Sarawak, containing an area of 13.476 hectares, more or less, and comprised in Bintulu Lease of Crown Land No. 6237 (hereinafter referred to as "the said landed property").

It is to be noted that the phrase "the said landed property" does not include the sub-divided lots and given my findings that there is no continuation of title and the inconsequential effect of the purported endorsement, clause 1 does not provide the plaintiff any power to act as it did in this proceeding.

I rule therefore that the plaintiff has no *locus standi* in commencing this action in view of the provisions of the Code and it must therefore be dismissed with costs.